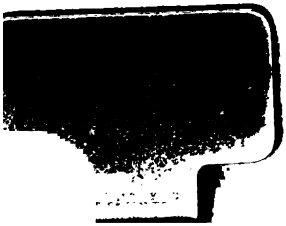

THE ACT

TO FURTHER

Amend the Law of Property,

(23 & 24 Vict. c. 38,)

WITH

INTRODUCTIONS AND PRACTICAL NOTES,

AND

WITH FURTHER NOTES ON 22 & 23 Vict. c. 35.

BY

SYLVESTER JOSEPH HUNTER,

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PRINTED BY
JOHN EDWARD TAYLOR, LITTLE QUEEN STREET,
LINCOLN'S INN FIELDS

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AN ACT

TO

FURTHER AMEND THE LAW OF PROPERTY.

JUDGMENTS. EXECUTION.

THE first and second sections of this Act relate to judgments as they affect land, and appear to have two objects: first, to assimilate the rights of a judgment creditor against the freeholds of the debtor to those which he enjoys against the leaseholds under the old law; and secondly, to prevent the use of judgments as continuing securities for debts. A short statement of the various statutes constituting the law of judgments will be necessary to explain the exact effect of these sections.

At common law, a creditor having obtained a judgment, had a right to have the amount of his judgment satisfied out of all the personal chattels of the debtor; to enforce this right he sued out a writ, called from its operative words, a *fieri facias*, whereby the Queen commanded the Sheriff to levy the amount; under this writ the Sheriff took possession of the debtor's chattels, and sold them, paying the amount to the creditor. This writ was always issued in some term, and took effect as if issued on the first day of that term, which whole period anciently was for many purposes considered as one

day only: hence it gave to the Sheriff the right to sell all chattels which had belonged to the debtor on the first day of the term, although they might in the meantime have come to the hands of a *bonâ fide* purchaser. This was felt to be a grievance, and was remedied by a clause in the Statute of Frauds (29 Car. II. c. 3, s. 16) enacting that no writ of *fieri facias* or other writ of execution should bind the property of the goods against which it is sued, but from the time that it is delivered to the sheriff or other officer to be executed; and the officer is required to indorse the date of receipt on every writ. It is held that leaseholds are here included under the word 'goods.'

Hence the claim of a judgment creditor to chattels real or personal in the hands of an honest purchaser cannot prevail unless he lodged his writ with the sheriff before the time of the sale by the debtor. This must of course be taken subject to the provisions of the Act for the Registration of Bills of Sale (17 & 18 Vict. c. 36), and also to the law as to frauds on creditors, declared by 13 Eliz. c. 5.

The Common Law gave no rights against land to judgment creditors; but the statute 13 Edw. I. c. 18 gave a writ, called an *elegit*, commanding the Sheriff to appraise the annual value of the debtor's land, and deliver one-half to the creditor to hold until his debt be satisfied. A very early case on the construction of the statute (*Sir John de Moleyn's case*, Year-book, 30 Edw. III, 24 a, quoted in Wms. Real Property, 67) decided that the creditor's right extended to all land which the debtor had at the time of the judgment entered up, or at any time afterwards, and that it was not displaced by a sale to a *bonâ fide* purchaser. Hence no purchaser could ensure his obtaining any value for his money, except

by ascertaining that no judgment was standing unsatisfied against his vendor.

Until the reign of William and Mary, no means existed of ascertaining this. A statute of that reign enacted that no judgment not docketed as therein mentioned should affect any lands as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators in the administration of their ancestor's, testator's, or intestate's estates: 4 & 5 Wm. & Mary, c. 20.

By 2 & 3 Vict. c. 11, s. 1, it is enacted that no judgment should thereafter be docketed, the result of which is that the creditor has no longer any remedy *at law* against lands in the hands of *bonâ fide* purchasers. Any conveyance made in bad faith would still be void as well at common law as under 13 Eliz. c. 5.

The statute 1 & 2 Vict. c. 110, s. 13 makes judgments a charge in equity upon the lands of the debtor; the ordinary rules of equity, and also the express enactment 2 & 3 Vict. c. 11, s. 5, protect purchasers without notice from being affected by this statutory charge; and 3 & 4 Vict. c. 84, s. 2, extended by 18 & 19 Vict. c. 15, s. 4, protects them, even when they have notice, unless the judgment be registered in the Common Pleas under 1 & 2 Vict. c. 110, s. 19, and such registry be duly kept alive.

Hence, until the passing of the present statute, a creditor having a registered judgment enjoyed a charge on all the lands of his debtor, which could be displaced only by a conveyance to a purchaser for valuable consideration and without notice.

With regard to what constitutes notice of a judgment, we may observe that a person who was shown to have searched the register of judgments

was fixed with constructive notice of a judgment which was there registered (*Procter* v. *Cooper*, 2 Drew, 1); in general, the rules relating to notice of judgments are the same as those regarding notice of any other matter.

The practice of taking judgments merely as securities for money seems to have been established so long ago as the time of Edward I. (see *Doe* v. *Carter*, 8 T. R. 61). At the present day, it is much in use, and has to a certain extent been recognized by the legislature, who have charged warrants of attorney to confess judgment for securing money with the same stamp-duty as is chargeable on bonds for a like amount (13 & 14 Vict. c. 97). This mode of proceeding is preferred to an ordinary equitable mortgage, because of the more sweeping nature of the remedy in case default be made in payment of the stipulated instalments or interest. This remedy is nothing less than the immediate issue of a writ or writs of execution, under which all the property and the person of the debtor can be taken. In some instances, the defeasance of the warrant of attorney contains a provision that execution shall not issue until such default as is mentioned; but sometimes the debtor is left entirely in the hands of the creditor, who can at any time enforce payment of the whole amount; to require the latter authority was not usual, but the legislature has by the following sections materially curtailed the rights of persons who shall advance their money on warrants of attorney containing the provision just mentioned.

This is done by the enactment that no judgment shall bind land as to purchasers unless a writ of execution have issued and been registered before the conveyance and payment of the purchase money; to which is added a provision that the writ must

be executed within three months after registration. Now, we have stated the provision of the Statute of Frauds that the property in goods should not be bound by a writ, except from the date of its issue, and leaseholds were held to be comprised under the term 'goods,' here. It follows therefore that the present enactment has placed freehold estates on the same footing with leaseholds with respect to judgments as against purchasers, and has enabled purchasers to ascertain whether execution has issued on any judgment.

Writs of execution of judgments to be registered.

I. Whereas it is desirable to place freehold, copyhold, and customary estates on the same footing with leasehold estates in respect of judgments, statutes, and recognizances (1) as against purchasers and mortgagees (2), and also to enable purchasers and mortgagees of estates, whether freehold, copyhold, or customary or leasehold, to ascertain when execution has issued on any judgment, statute, or recognizance, and to protect them against delay in the execution of the writ: Be it therefore enacted, that no judgment, statute, or recognizance to be entered up after the passing of this Act (3) shall affect any land (of whatever tenure) as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee, (whether such purchaser or mortgagee have notice or not of any such judgment, statute, or recognizance,) unless a writ or other due process of execution of such judgment, statute, or recognizance shall have been issued and registered as hereinafter is mentioned, before the execution of the conveyance or mortgage to him, and the

payment of the purchase or mortgage money by him (4): Provided always that no judgment, statute, or recognizance to be entered up after the passing of this Act, nor any writ of execution or other process thereon, shall affect any land, of whatever tenure, as to a *bonâ fide* purchaser or mortgagee, although execution or other process shall have issued thereon, and have been duly registered, unless such execution or other process shall be executed and put in force within three calendar months from the time when it was registered.

Mode of Registering.

II. The registry hereinbefore required of any writ of execution, or other due process, on any judgment, statute, or recognizance, in order to bind a purchaser or mortgagee, shall be made by a memorandum or minute referring to the judgment, statute, or recognizance already registered, so as to connect the registry of the writ of execution or other process therewith; such memorandum or minute to be left with the Senior Master of the Court of Common Pleas at *Westminster*, who shall forthwith enter the particulars in a book, in alphabetical order, by the name of the person (5) in whose behalf the judgment, statute, or recognizance upon which the writ of execution or other process issued was registered, and also the year and the day of the month when every such memorandum or minute is left with him; and such officer shall be entitled, for any such registry, to the sum of five shillings; and all persons shall be at liberty to search the same book, in addition to all the other books

in the same office, on payment of the sum of one shilling only. And all the provisions in this Act in regard to writs of execution, or other process, and the registry thereof, or otherwise relating thereto, shall extend *mutatis mutandis* to writs of execution or other due process issuing on judgments of the several Courts of Common Pleas of the County Palatine of *Lancaster*, and of Pleas of the County Palatine of *Durham*; (6) but none of these provisions are to extend to *Ireland*.

(1) As to statutes and recognizances see Prideaux on Judgments, 146.

(2) The former Act (22 & 23 Vict. c. 35, s. 25) contained a definition of 'Mortgagee' which is perhaps larger than the usual meaning of the word; probably this definition would be adopted here, if the point arose.

(3) Hence the Act has no operation upon the rights of persons as affected by judgments entered up before the 23rd of July, 1860.

(4) To secure the protection of this Act, the purchase or mortgage must have been completed in both its parts, conveyance and payment, before the registry of the writ; this is analogous to the rule of equity that a purchaser is bound by an equitable claim of which he has notice before the execution of the deeds and payment of the money. See Sugd. V. & P. 642; 2 Lea. Ca. in Eq. 17.

If the writ have in fact been registered, before the completion of the transaction, it matters not that the purchaser has no notice of it; it follows that, if it be known by the register or otherwise that there is a judgment against the vendor, the

purchaser should search the register of writs at the latest possible moment.

(5) These provisions for registration of writs seem similar to those contained in former Acts for the registration of judgments. It is not easy to see why writs should be registered in the order of the names of plaintiffs, rather than defendants.

(6) The ordinary provisions as to registration of judgments are extended to the Courts of Lancaster and Durham by 18 & 19 Vict. c. 15.

JUDGMENTS. HEIRS, &c.

One of the first duties of the executors or administrators of a deceased person is to pay his debts, as far as the personal estate will go, and if it fail, then resort may be had to the real estate. Supposing the whole estate, real and personal, to be insufficient, some of the debts must abate; and for this purpose the law does not consider all creditors to be on the same footing, but ranges them in different classes, according to the various degrees of diligence they have shown, or other circumstances. See 2 Lea. Ca. in Eq. 91, where will be found the various gradations of debts. Now it is the duty of an executor to pay all debts of which he has notice, belonging to a higher class, before paying any of a lower class; and if he act otherwise, he is personally liable to the neglected creditor. In this there would be little hardship upon the executor, who acted with his eyes open; but a technical rule of law exists, which, in combination with the above seemingly just principle, often produced the greatest injustice.

It will be seen in the book referred to that a creditor by judgment belongs to the one of the most

favoured classes, and must be satisfied in priority to all ordinary creditors. Now a judgment was considered by the old law to be a matter of such solemnity and notoriety that an executor was not allowed to allege ignorance of the existence of a judgment standing unsatisfied against his testator. Of course it often happened in fact that the executor knew nothing of the matter; in such a case, if he exhausted the estate in payment of inferior creditors, he might often be made personally to satisfy an hitherto unknown claimant, while of course no means existed of compelling the inferior creditors to refund any part of what they had received. To remedy this evil, the statute 4 & 5 Wm. & Mary, c. 20 enacted, in the terms set out in the preamble to the 3rd section of this Act, that no judgment should have any preference against heirs, executors, or administrators, unless duly docketed. This provision gave to representatives the means of ascertaining whether any judgment was in fact subsisting against the deceased; so that they had no longer any reason for acting in ignorance of that which the law presumed to be notorious to them. But the primary object of the Docketing Act was the protection of purchasers against secret judgments; and in the course of legislation with regard to judgments it was found expedient to enact (2 & 3 Vict. c. 11, s. 1) that no judgment should thereafter be docketed, while other provisions were then made for the protection of purchasers.

Probably the framers of this statute of Victoria entirely overlooked the clause of the Docketing Act in favour of executors and other representatives. Some little time elapsed before the point arose: but in 1859 the case of *Fuller* v. *Redman*, 7 W. R. 430, came before the Master of Rolls. Here a creditor

who had a judgment, but had neglected to register it in the Common Pleas under 1 & 2 Vict. c. 110, s. 19, (and who therefore had no claim against land in the hands of purchasers,) claimed payment of his debt from the administrator; the administrator was shown to have received assets, but alleged that he knew nothing of the judgment, and that he had paid away to simple contract creditors all that he had received. The Master of the Rolls very unwillingly decreed that the administrator was still liable to satisfy the claim of the judgment creditor, considering that the law stood just as if the statute of William and Mary had been simply repealed.

The effect of the third and fourth sections is to give to heirs, executors, and administrators the same protection against judgments as was enjoyed by purchasers before the passing of this Act. In order that a judgment debt may retain its priority in administration over other debts, it must be registered, and re-registered every five years. Thus by searching the register for five years back, all judgments entitled to priority will be discovered.

Provision for protection of heirs and executors against unregistered judgments.

III. And whereas by an Act passed in the fourth and fifth years of their late Majesties King *William* and Queen *Mary*, intituled *An Act for the better Discovery of Judgments in the Courts of King's Bench, Common Pleas, and Exchequer in* Westminster, it was enacted that no judgment not docketed and entered in books in the manner thereby provided should affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates'

estates; and whereas by several later Acts judgments are required to be registered with more particulars than were required by the said recited Act, and it is thereby enacted that judgments not so registered shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until the same shall be registered in manner thereby required, and in obedience to a direction in one of the same Acts contained, the dockets existing under the said first-recited Act have been finally closed: And whereas the said several later Acts do not expressly enact that judgments not docketed (1) as thereby required shall not have any preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates' estates, in consequence whereof such heirs, executors, or administrators have been held (2) to have lost the protection which they enjoyed under the said first-recited Act; and it is expedient that the same should be restored: Be it therefore declared and enacted, That no judgment which has not already been or which shall not hereafter be entered or docketed (1) under the several Acts now in force, and which passed subsequently to the said Act of the fourth and fifth years of King *William* and Queen *Mary*, so as to bind lands, tenements, or hereditaments as against purchasers, mortgagees, or creditors, shall have any preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates' estates.

Judgments as against heirs and executors to be re-registered.

IV. No judgments which, since the passing of an Act of the first and second years of Her Majesty Queen *Victoria*, intituled *An Act for Abolishing Arrest on Mesne Process in Civil Actions, except in certain cases, for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in* England (being one of the Acts hereinbefore referred to), have been registered under the provisions therein contained or contained in the later Act of the second and third years of Queen *Victoria*, chapter eleven, as explained and amended by the Act of the session of the eighteenth and nineteenth years of Queen *Victoria*, chapter fifteen (being two other of the Acts hereinbefore referred to), or which shall hereafter be so registered, shall have any preference against heirs, executors, or administrators in their administration of their executors'*, testators', or intestates' estates, unless at the death of the testator or intestate five years shall not have elapsed from the date of the entry thereof on the docket, (1) or from the only or last re-registry thereof, as the case may be, which re-registry from time to time is hereby authorized to be made in manner directed by the said Act of the second and third of Queen *Victoria*, as explained and amended by the Act of the eighteenth and nineteenth of Queen *Victoria*; but it shall be deemed sufficient to secure such preference as aforesaid if such a memorandum as was required in the first

* This is clearly a mistake for 'ancestors.'

instance is again left with the Senior Master of the Common Pleas within five years before the death of the testator or intestate, although more than five years shall have expired by effluxion of time since the last previous registration before such last-mentioned memorandum or minute was left, and so *toties quoties* upon every re-registry. (3)

Extent of the word "judgment."

V. In the construction of the previous provisions the term judgment shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of a judgment. (4)

(1) The word 'docket' here refers to the entry of judgments under the modern Acts: this is in these Acts termed registration.

(2) That is to say, in the case of *Fuller* v. *Redman*, cited *ante* p. 9.

(3) The result of this section seems to be that a search extending over a period of five years from the date of the search will disclose to an heir, executor, or administrator all judgments of which he is bound to take notice in his administration. Although it is not expressly said that an unregistered judgment is to have no preference even against a representative who has notice of it, yet this would seem to follow from the expressions used.

(4) This explanation is the same as that given in 22 & 23 Vict. c. 35, s. 25.

WAIVER.

The enactment contained in the 1st section of 22 & 23 Vict. c. 35 extends only to take away the *unnatural* effect of a license given by a landlord, dispensing with a covenant or condition in a lease. The present section goes further, and removes the unnatural effect of a waiver of a past breach. Thus if a tenant commit a breach of the covenant to pay rent, the landlord will in general thereby gain a present right to enforce a forfeiture by ejectment, inasmuch as the condition of re-entry has arisen: the landlord may now 'actually' waive this present right, without prejudicing his rights upon any future breach of this or any other covenant or condition.

The notes on the first three sections of 22 & 23 Vict. c. 35 may be consulted on the whole subject.

Restriction of effect of waiver.

VI. Where any actual (1) waiver of the benefit of any covenant or condition in any lease on the part of any lessor or his heirs, executors, administrators, or assigns shall be proved to have taken place after the passing of this Act (2) in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or (3) any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition unless an intention to that effect shall appear. (4)

(1) It may be doubted whether this word 'actual' adds anything to the sense. The only force

which it seems possible to give it makes it synonymous with 'express;' so that 'actual waiver' is a waiver by an express writing or other act, as opposed to a waiver implied by construction of law from some act of recognition of the tenancy. Express waivers, however, are so far from common, that probably the expression 'actual waiver' will be construed to include waivers of every kind.

(2) The section is prospective, not altering any existing rights: it applies, however, to all leases of whatever date.

(3) This word 'or' appears to be a mistake for 'of.'

(4) Full effect is given to the landlord's intention, if it appear: the effect of the section is only to alter the presumption of law, in case no intention appear.

FUTURE AND CONTINGENT USES.

The subject to which the following section of this Statute relates is one of great subtlety, into which there is no occasion to enter deeply. The following remarks will probably enable the reader to understand as far as he will wish, what is the effect of the section.

If before the Statute of Uses, 27 Hen. VIII. c. 10, a feoffment, grant, or other common-law conveyance were made of land to X. and his heirs to the use of A. and his heirs until a certain marriage took effect, and from and after that marriage to the use of B. for life, with remainders over: here the legal estate was in X., and until the happening of the marriage, A. was to X. in the position of a modern

cestui que trust to his trustee: but upon the celebration of the marriage, the *shifting use* in favour of B. arose, and X. was thenceforth trustee for B. and the remainder-men. The claims of A. and B. might be displaced by an alienation of the land by X. to one who had no notice of the uses: see 1 Sanders on Uses, 58. This is analogous to the modern doctrine that a plea of a purchase for valuable consideration without notice is a good answer to a bill to enforce a trust or other equitable claim: moreover it was held that the lord taking land by escheat took it discharged from the use. 1 Sanders on Uses, cap. 1, sec. 9. (1)

The Statute of Uses gave the legal estate to those who before had nothing but the use, in all cases where one person was seized to the use of another: hence in the case of the above settlement, the legal estate would be in A. and his heirs until the marriage, and would then shift to B., inasmuch as X. would then be seized to the use of B. But suppose an event to have happened before the marriage which would prevent X. being any longer seized to any use: for instance, suppose X. to have died, and left no heir or devisee: who then is seized to the use of B.? The question has been much discussed, but it does not seem ever to have arisen in a shape calling for a complete judicial determination. Lord St. Leonard's, in his Treatise on Powers, cap. 1, sec. 3, argues it at length, and arrives at the conclusion that the continued existence of a seizin to the uses is unnecessary, but that the seizin to the uses of the settlement which was originally in X. is sufficient to serve the use to B.

The above is a simple case in which the question arises: but my others many be put. They essentially involve (1) a seizin to uses, whether created

by feoffment, grant, release, bargain and sale, covenant to stand seized, devise, or otherwise: (2) estates declared in those uses by way of contingent remainder, or unconformably to common law estates, whether by way of springing or shifting use, or of appointment under powers: (3) an event occurring before the arising of the springing, shifting, or future use, which would have the effect of destroying an estate in fee simple vested in the person seized to uses, or of transferring it to some one against whom the objects of the settlement could not have successfully claimed the beneficial ownership.

There can be little doubt that if the question had arisen, it would have been decided in accordance with the opinion of Lord St. Leonard's: the following section, which is retrospective as well as prospective, establishes that opinion as the law.

Provision for cases of future and contingent uses.

VII. Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate, or future, or contingent, or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses (1), and the continued existence in him (2) or elsewhere of any seisin to uses or *scintilla juris* (3) shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses, nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended, or to remain, or to subsist in him or elsewhere.

(1) There has never been any doubt that this was the true law, as regards estates which vested at the creation of the use. The feoffee to uses at that moment stood seised to the use of all who took vested estates under the declaration of use, and thus the condition of the statute was fulfilled, and the use was at once clothed with the legal estate, whether in possession, or in reversion, or vested in remainder.

(2) The adversaries of the opinion which has now received the sanction of the Legislature maintained that the original feoffee could not be said to be seised to the use of those who took contingent or executory estates in the use, and that therefore the statute did not apply, until these estates vested: they held, therefore, that a something remained in the feoffee or elsewhere, by virtue of which he would acquire a momentary seisin to the use of those in whom the estates originally contingent or executory, had at that moment vested.

(3) The name *scintilla juris* was invented to express this something. Those who advocated its existence disputed among themselves whether it was to be found in the feoffee to uses (in which case it would be liable to forfeiture, escheat, etc.) or whether it were *in custodiâ legis*, or *in gremio terræ* or elsewhere. The present statute finally determines that those who denied that this something existed anywhere were correct.

FRAUDS ON MORTGAGEES.

The 8th section merely remedies an inaccuracy in the wording of 22 & 23 Vict., c. 35, s. 24, imposing penalties on the falsification of abstracts, by any vendor or mortgagor, or solicitor.

Sect. 24 of 22 & 23 Vict. c. 35, extended to mortgagees.

VIII. The section twenty-four in the Act of the session of the twenty-second and twenty-third of Queen *Victoria*, chapter thirty-five, shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in the said section.

TRUSTEES. SUMMARY APPLICATIONS.

The next section appears not to require any explanation nor notes. It differs little in its nature from one of the orders of court which follow it. Both the section and the orders are intended to regulate the practice of these applications, on which some uncertainty appears to have existed.

This seems the proper place to notice the judicial decisions which have been reported upon 22 & 23 Vict. c. 35, s. 30. Some of these relate to the question who is to be served with the petition, on which point it appears that a difference of opinion exists, which the orders of the 20th of March, 1860, fail to clear up: as is the case also with the question how far affidavits are admissible, in proof, disproof, or explanation of the trustees' statement. The first of the orders above referred to contemplates the use

of some affidavits; but these may be only affidavits of service, or of other formal matters.

In *Re Muggeridge's Trusts* (1 Joh. 625; 29 L. J. Ch. 288; 6 Jur. N. S. 192; 8 W. R. 234) Vice-Chancellor Wood is reported to have said that it was very ill-advised for the trustee to serve any one with the petition, for the Court would require the parties to be served and appear if necessary. The trustees should, in the first place, ask* the direction of the Judge as to who should be served: and his Honour acted on this opinion by dismissing the petition with costs as against a person who had been unnecessarily served. In the same case the costs of all affidavits were disallowed: and the petition ordered to be amended by inserting some circumstances of explanation which appeared upon the affidavits. It is said (8 W. R. 404) that his Honour reiterated this opinion as to service in *Re Timpson's Will*, which is reported on another point in 8 W. R. 388.

In the case of *Green's Trust* (35 L. T. 275; 8 W. R. 403) the petition appears to have been put in Vice-Chancellor Kindersley's paper, for the purpose of obtaining his direction as to service, and *Re Muggeridge* was quoted. This learned Judge however said that he would never allow the petition to be brought on merely for the purpose of ascertaining who were to be served. The parties must serve such persons as they thought proper, and state in the note at the end of the petition whom they had served. Any other course was so manifestly inconvenient that he and the other Judges had agreed to pursue the course he now spoke of.

It would appear therefore that the selection of persons to be served with these petitions is guided

* Probably by summons in chambers.

by the same rules as apply in the case of other petitions, care being taken to observe that the object of the petition is to obtain not a determination of the rights of parties, but merely an indemnity to the trustees. The names of the persons served must be stated in a foot-note according to the 34th Cons. Ord. r. 1.

With regard to the admissibility of affidavits, the Master of the Rolls in *Re Pitts*, 29 L. J. Ch. 168, appears to have made no objection to their use; but it is difficult not to think that the course adopted in *Re Muggeridge (ubi supra)* was more in accordance with the design of the framers of the Act of last session. The object of the Act appears to have been to enable trustees to use the following argument, if called to account by their *cestuis que trust* for any alleged neglect of duty: (1) If the circumstances were as stated to the Court, the course adopted was the proper course. But (2) the circumstances were as stated to the Court. Therefore (3) the course adopted was the proper course. The 30th section of 22 & 23 Vict. c. 35 precludes *cestuis que trust* from questioning the first of these propositions in any suit against the trustee, whom we presume to have acted in accordance with the judicial opinion, advice, or direction obtained: it is therefore most important that this opinion, etc., should be such that the first proposition should be true; but upon the argument of this question, which is merely a point of law, affidavits have no place. The second proposition is one of fact, which the trustee must be prepared to establish, if called upon; but with this the Judge giving his opinion, advice, or direction has nothing to do.

Other reported decisions relate to the question

what is meant by the management or administration of the trust property, in 22 & 23 Vict. c. 35, s. 30. Many petitions have been presented requesting opinions on the construction of instruments, with reference to the events which had happened: *Re Muggeridge* (1 Joh. 625; 29 L. J. Ch. 288; 6 Jur. N. S. 192; 8 W. R. 234); *Re Green*, 35 L. T. 275; 8 W. R. 403; and as to the propriety of proposed investments; *Re Miles' Will*, 29 L. J. Ch. 47; 5 Jur. N. S. 1236; 35 L. T. 122; 8 W. R. 54; *Re Timpson*, 35 L. T. 170; 8 W. R. 388. But in *Re Mochet's Will*, 8 W. R. 235, Vice-Chancellor Wood declined to give an opinion on a difficult point of law which was raised by the petition, and suggested that a bill should be filed; he observed that his decision would be subject to no appeal, and would not prevent a bill being filed, if any of the parties thought fit.

In *Re Barrington's Estate*, 8 W. R. 577, Vice-Chancellor Wood declined to authorize trustees' expending a portion of the trust funds in permanent improvements upon lands subject to the trusts of the settlement, upon the ground that it was a question of pure detail, which the Court never carried out, without affidavits. The petition in this case contained a statement of a surveyor's estimate of the money which might be profitably expended. His Honour directed a bill to be filed. In the prior case of *Re* —— (a lunatic), 8 W. R. 333, the Lords Justices allowed trustees to pay the income of a trust fund belonging to the lunatic to certain persons who undertook to apply it for her benefit. It would seem that the objections urged in *Re Barrington* apply with equal force in this case. One of the questions addressed to the Court has in many cases related to the costs of the application: these were

allowed out of the trust funds in *Re* —— (a lunatic), *Re Muggeridge*, and in other cases. In *Re Barrington* the Vice-Chancellor said that the costs might be provided for in the suit which he suggested.

Form of applying for advice of Judge, etc. under section 30 of 22 & 23 Vict. c. 35.

IX. Where any trustee, executor, or administrator shall apply for the opinion, advice, or direction of a Judge of the Court of Chancery under the thirtieth section of the Act of the twenty-second and twenty-third of Her present Majesty, chapter thirty-five, the petition or statement shall be signed by counsel, and the Judge by whom it is to be answered may require the petitioner or applicant to attend him by counsel, either in chambers or in court, where he deems it necessary to have the assistance of counsel.

The following Orders, signed by all the Judges, were issued on the 20th of March, 1860, under the authority of 22 & 23 Vict. c. 35, s. 30:—

I. All Petitions, Summonses, Statements, Affidavits, and other written proceedings under the 30th section of the said Act, shall be intituled "In the matter of the said Act, and in the matter of the particular Trust, Will, or Administration," and every such petition and statement shall be marked in manner directed by the 6th of the Consolidated General Orders, Rule 6, and every such petition or statement shall state the facts concisely, and shall be divided into paragraphs numbered consecutively, and every such summons shall, except as to its title,

be in the form of the General Summons in Schedule (K) No. 1 subjoined to the Consolidated General Orders.

II. At the time when any such summons is sealed, the statement upon which the same is grounded shall be left at the chambers of the Judge, and shall on the conclusion of the proceeding be transmitted to the Registrar by the Chief Clerk, with the minutes of the opinion, advice, or direction given by the Judge; and the Registrar shall cause such statement to be transmitted to the Report Office to be there filed.

III. Every such petition or summons shall be served seven clear days before the hearing thereof, unless the person served shall consent to a shorter time.

IV. The opinion, advice, or direction of the Judge shall be passed and entered and remain as of record in the same manner as any Order made by the Court or Judge, and the same shall be termed a "Judicial Opinion," or "Judicial Advice," or "Judicial Direction," as the case may be.

V. The fees of court and the fees and allowances to solicitors on proceedings under the 30th section of the said Act shall be the same as are now payable under the Consolidated General Orders XXXVIII. and XXXIX. and by the practice of the Court for business of a similar nature.

TRUSTEES' INVESTMENTS.

It is well known that the only funds upon which trustees were until recently entitled to invest the trust property were the Three-per-cent. Government stocks; further option might of course be given at the discretion of the author of the trust, but in the absence of express directions, no other choice was given. This rule was altered by the statute 22 & 23 Vict. c. 35, s. 32, which effected a change in the presumption as to the intention of the settlor or testator, enacting that if any trustee were not expressly forbidden to invest on 'real securities in any part of the United Kingdom, or on stock of the Bank of England or Ireland, or on East India stock,' it should be lawful for him to adopt such investments. On the construction of this section, it was decided by the Master of the Rolls, in the case of *Re Miles' Trusts*, 29 L. J. Ch. 47,* that it was not retrospective; that is to say, that it gave no new authority to trustees under trusts created before the 13th of August, 1859, being the day of passing of the Act. See also *Dodson* v. *Sammel*, 29 L. J. Ch. 335; 35 L. T. 429; 8 W. R. 252.

The state of the law, therefore, between the 13th of August, 1859, and the 23rd day of July, 1860, was this: the Three-per-cents. were open to all trustees, and those whose trusts were created after the former day were at liberty to have recourse also to real securities in England, Scotland, or Ireland, or to Bank stock, or East India stock, unless the instrument of creation contained express directions to the contrary. In the case of the *Colne Valley*,

* 5 Jur. N. S. 1236; 35 L. T. 122; 8 W. R. 54.

1 Joh. 528,* the question arose whether money in Chancery would upon petition of the parties be invested in the New India Five-per-cent. stock: all the Judges (the Lord Chancellor, the Lords Justices, and Vice-Chancellor Wood) concurred in declining to make the order. It is not very clear how far the Judges considered that the proposed fund was not included in the term East India stock used in the Act; or how far they merely in their discretion refused to sanction the proposed investment. The former view as to the effect of the decision was adopted by V. C. Stuart in *Re Fromond*, 8 W. R. 272, when his Honour refused to hear any argument to the contrary.

Trustees therefore cannot be advised to make investments in the stock in question; and the same may be said of Scotch real securities, on which some remarks by the Master of the Rolls will be found in the case of *Miles' Will (ubi supra)* already cited on another point.

The new Act has made great alterations in the law of trustees' investments, as will be seen on reading the following sections.

Power to Lord Chancellors, etc., of England and Ireland to make general orders as to investment of cash under the control of

X. It shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners for the Custody of the Great Seal of *England*, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors of the said Court, or any three of them, and for the Lord Chancellor of *Ireland*, with the advice and assistance of the Lords Justices of Appeal and the Master of the Rolls in *Ireland*, to make such

* 29 L. J. Ch. 33; 35 L. T. 4; 8 W. R. 18.

general orders from time to time as to the investment of cash under the control of the Court either in the Three-per-cent. Consolidated, or Reduced, or New Bank Annuities, or in such other stocks, funds, or securities, as he or they shall with such advice or assistance see fit; (1) and it shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners in *England*, and for the Lord Chancellor in *Ireland*, to make such orders as he or they shall deem proper for the conversion of any Three-per-cent. Bank Annuities now standing or which may hereafter stand in the name of the Accountant-General of the said Court of Chancery in trust, in any cause or matter, into any such other stocks, funds, or securities, upon which by any such general order as aforesaid, cash under the control of the Court may be invested; all orders for such conversion of Bank Annuities into other funds or securities to be made upon petition, to be presented by any of the parties interested, in a summary way, and such parties shall be served with notice thereof as the Court shall direct. (2)

Trustees, etc., to invest trust funds in the stocks, etc., in which cash under the control of the Court may be invested.

XI. When any such general order as aforesaid shall have been made, it shall be lawful for trustees, executors, or administrators, having power (3) to invest their trust funds upon Government securities, or upon Parliamentary stocks, funds, or securities, or any of them, to invest such trust funds, or any part thereof, in any of the stocks, funds, or securities, in or upon which, by such general order, cash under

the control of the Court may from time to time be invested.

Clause 32 of 22 & 23 Vict. c. 35 to act retrospectively.

XII. Clause Thirty-two of the said Act of the twenty-second and twenty-third of Queen *Victoria*, chapter thirty-five, shall operate retrospectively. (4)

(1) These words give to the Judges in Equity the widest discretion as to the securities on which the investment of trust money may be authorized. It is probable however that this discretion will not be exercised by the selection of any funds which do not combine the characters of permanence and security. Bank stock and the old East India stock seem to combine these characters in almost as great a degree as the Government Three-per-cent. stocks; but the 12th section of the present Act operates, as will be seen directly, to render the machinery of the 10th section unnecessary as to these stocks. Nothing but time can show whether any practical operation will be given to the 10th and 11th sections.

(2) General orders to be made under this section will probably contain some directions as to the parties to be served with notice. In the absence of such directions, the general rule will, it is presumed, be that all persons interested must be served, or at least that all classes of interests must be represented before the Court. Investments of cash in Consols, will be made on the sole application of any person interested (Dan. Ch. Pr. by Headlam, 3rd ed. 1309); but in that case it is presumed that the investment must necessarily be for the benefit of all persons interested: the case is otherwise with other securities.

(3) It is not clear whether this power must be express, or whether the power which the old general law gave to trustees will not be sufficient. No effect is given by this section to an express clause in a settlement or will prohibiting investments on any but specified stocks. A trustee therefore who disregarded such a prohibition would have the letter of the law with him: but no trustee could be advised to act thus in contempt of the instrument creating his office.

(4) Hence all trustees, not expressly prohibited, may now invest upon the securities enumerated in 22 & 23 Vict. c. 35, s. 32: see *ante*, p. 25. Of course no such express prohibition can be contained in any trust instrument executed previously to the Act of 1859.

In drawing instruments creating trusts, it is probably expedient to enumerate the securities on which the author of the trust wishes the trustees to have power to invest, and then, by the words 'but on no other stocks, funds, or securities whatsoever,' or the like, to impose that express prohibition which is contemplated by 22 & 23 Vict. c. 35, s. 32. Whether this would hinder trustees from availing themselves of larger powers under 23 & 24 Vict. c. 38, s. 11, we have already seen to be doubtful.

The actual state of the law on the subject of trustees' investments is summed up as follows by Lord St. Leonard's, in a letter bearing date the 29th of August, 1860, and published in the 'Times' newspaper soon after that day:—

"The result is that trustees (including executors and administrators) may, unless forbidden by their trust, invest the trust fund in real securities in Great Britain or in Bank stock of Great Britain or

Ireland, or in East India stock, which has been held to mean the Old East India stock. The Court itself can invest cash in such stocks, funds, and securities as it shall see fit, and make a general order for the purpose; and upon the petition of parties interested, Three-per-cents. may be converted by the Court into such securities as cash may be invested upon under any general order, and trustees with the usual powers to invest may resort to the same securities. The power to the Court is general, and does not enumerate any particular securities, as it was considered that there was no danger of this power being unduly exercised. The principal assuredly will never be placed in danger in order to obtain a large interest.

"The 32nd section of the 22nd and 23rd Victoria, cap. 35, is not properly framed, but it is not likely to be abused, as trustees will no doubt act with great caution under it. By the bill of the late session, as it was sent to the House of Commons, this clause was repealed, but that House not only rejected the repeal clause, but made the original clause retrospective. The new clauses relating to trust funds in the bill of the late session were framed by me with the approbation of all the Equity Judges, and inserted in the House of Commons. There was another clause in substitution of the 32nd section of the 22nd and 23rd Victoria, cap. 35, which that House of course objected to adopt, as they were determined to retain the 32nd section as it stood."

INTESTATES' ESTATES.

It is well known that the earlier statutes of limitation did not extend to equitable claims; but that Courts of Equity merely followed the analogy of these statutes, as fixing the time after which they would not allow claims to be prosecuted: see Burton on Real Property, 8th edition, 425. When no corresponding legal right existed, it is clear that there could be no statute limiting the time for enforcing the legal right; therefore in such cases no analogy could be found to guide the Courts of Equity, and these Courts had recourse to their own inherent principles, which rejected the claim of one who had been guilty of unreasonable *laches*. At the present day, there are many species of equitable claims to which no definite period of limitation is applicable.

Two tribunals formerly existed for the recovery of legacies and intestate portions, the Courts of Equity and the Ecclesiastical Courts. That the Courts of Common Law had no jurisdiction in the case even of legacies charged on land is shown by the cases of *Deeks* v. *Strutt*, 5 T. R. 690; *Braithwaite* v. *Skinner*, 5 M. & W. 313. The statute which transferred to the Court of Probate the testamentary jurisdiction of the Ecclesiastical Courts does not allow the new Court to entertain suits for legacies, or for intestate shares: see 20 & 21 Vict. c. 77, s. 23: hence, the only tribunals now available for this purpose are the Courts of Equity.

Suits for legacies and for intestate portions were therefore formerly subject to no period of limitation; but this was altered by 3 & 4 Wm. IV. c. 27, s. 40, which enacted, in the terms set out in the preamble to 23 & 24 Vict. c. 38, s. 13, that no pro-

ceeding to recover any legacy should be brought but within twenty years after the accruer of a present right to receive it, or after a written acknowledgment, or any payment on account of principal or interest. It was at first doubted whether this section extended to legacies not charged upon land, but it has been decided that it does so: see Shelford, Real Property Statutes, p. 244,—and the cases of *Paget* v. *Foley*, 2 Bing. N. C. 679; *Sheppard* v. *Duke*, 9 Sim. 569; and *Henry* v. *Smith*, 2 Dr. & W. 391, there cited.

This section of the statute 3 & 4 Wm. IV. c. 27, must be taken in connection with the 25th section of the same statute, which enacts that when an express trust has been declared of land, no lapse of time is to bar the *cestuis que trust*, in a suit against the trustee, except when a case of *laches* or acquiescence is established: see also 3 & 4 Wm. IV. c. 27, s. 27.

It will be observed that nothing in 3 & 4 Wm. IV. c. 27 affects the right of one of the next of kin of an intestate to call upon the administrator for an account and payment of his share; such a suit therefore, until the present year, belonged to the class before alluded to, with regard to which no definite period of limitation was fixed. This is now altered by the following section, which puts such next of kin into the position already held by legatees. Of course the 25th section of 3 & 4 Wm. IV. c. 27, applies to this as to all other cases of express trust: a next of kin who has obtained a declaration of trust from an administrator cannot be prejudiced by any lapse of time.

Extension of sect. 40 of 3 & 4 Wm. IV.

XIII. Whereas by the Act of Parliament of the third and fourth of *William* the Fourth,

chapter twenty-seven, section forty, it was enacted that after the thirty-first day of *December*, One thousand eight hundred and thirty-three, no action, or suit, or other proceeding should be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of any land, or rent at law, or in equity, or any legacy but within twenty years next after a present right to receive the same should have accrued to some person capable of giving a discharge for, or release of the same, unless such acknowledgment in writing (1) or payment of principal or interest as therein mentioned should have been given or made, and then within twenty years next after such payment or acknowledgment, or the last of such payments or acknowledgments. And whereas it is expedient that the said enactment should be extended to the case of claims to the estates of persons dying intestate: Be it therefore enacted, that after the thirty-first day of *December*, One thousand eight hundred and sixty, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate of any person dying intestate possessed by the legal personal representative of such intestate, but within twenty years next after a present right (1) to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate, or share, or some interest in respect thereof shall have been accounted for, or paid, or some acknowledg-

c. 27, s. 40 to cases of claims to estates of intestates.

ment (2) of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought but within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments if more than one was made or given.

(1) These words occur also in 3 & 4 Wm. IV. c. 27, s. 40; some difficulty has been felt as to their interpretation there, as to which see Shelford, R. P. Acts, 245, and the cases there cited.

(2) As to the requisites of an acknowledgment under 3 & 4 Wm. IV. c. 27, s. 40, see Shelford, R. P. Acts, 246. The cases there quoted apply to the interpretation of the present section, which uses the same words as those of the statute of William IV.

EXECUTORS. SUMMARY APPLICATIONS.

Suits to administer the personal estates of deceased persons may be commenced either by the executor or administrator, or by a creditor, legatee, next of kin, or other claimant. In either case, the decree is the same, directing accounts to be taken of the personal estate, and of the debts, legacies, etc., and the prosecution of such decrees forms a large part of the administrative business of the Court of Chancery. The pleadings in such suits were so simple and uniform, that the Legislature has thought fit, in many cases, to dispense with them altogether; and accordingly by the 19th section of

13 & 14 Vict. c. 35 it is enacted that a decree for an account of the debts and liabilities affecting the *personal* estate (see *Re Moore*, 2 W. R. 85) may be obtained by an executor or administrator by mere motion, without any service: *Re Harrold*, 20 L. J. Ch. 168; *Re Brown*, 6 W. R. 5; and by the following sections power is given to the Court to make all consequential orders as could have been made after such a decree in a suit formally instituted.

The 45th and 46th sections of 15 & 16 Vict. c. 86 establish a summary course of proceeding, by which claimants against the personal estate of a deceased person may obtain a decree to account against the executors or administrators; and the 47th section of the same Act extends a similar remedy to the real estate in certain cases.

No order could be made under 13 & 14 Vict. c. 35, ss. 19–25 until after the expiration of one year from the death of the deceased; this is by virtue of a proviso at the end of section 19; and the object of 23 & 24 Vict. c. 38, s. 14 may be described to be the repeal of this proviso.

The reader is referred to Morgan's Chancery Acts and Orders for notes of the points that have been decided on the construction of 13 & 14 Vict. c. 35. There does not appear to be any summary mode by which heirs or devisees can obtain an account of the liabilities to which the estate of their ancestor or testator is subject.

Order to take account of debts, etc., of deceased person under sect. 19 of 13 and 14 Vict. c. 35 may be made imme-

XIV. The order to take an account of the debts and liabilities affecting the personal estate of a deceased person pursuant to the nineteenth section of the Act of the thirteenth and fourteenth years of *Victoria*, chapter thirty-five, may

diately after probate granted.

be made immediately or at any time after probate or letters of administration shall have been granted, and such order may be made either by the Court of Chancery, upon motion or petition of course, or by a Judge of the said Court sitting at chambers, upon a summons in the form used for originating proceedings at chambers;(1) and after any such order shall have been made the said Court or Judge may, on the application of the executors or administrators, by motion or summons, restrain (2) or suspend, until the account directed by such order shall have been taken, any proceedings at law against such executors or administrators by any person having or claiming to have any demand upon the estate of the deceased by reason of any debt or liability due from the estate of the deceased, upon such notice and terms and conditions (if any) as to the said Court or Judge shall seem just; and the Judge in taking an account of debts and liabilities pursuant to any such order shall, on the application of the executors or administrators, be at liberty to direct that the particulars only of any claim or claims which may be brought in pursuance to any such order, shall be certified by his chief clerk without any adjudication thereon; and any notices for creditors to come in which may be published in pursuance of any such order, shall have the same force and effect as if such notices had been given by the executors or administrators, in pursuance of the twenty-ninth section of the Act of the twenty-second and twenty-third years of *Victoria*, chapter thirty-five. (3)

(1) The power to make these orders in chambers is new, but this will probably be the course generally adopted. No service will be necessary: *Re Harrold*, 20 L. J. Ch. 168.

(2) The Court has always restrained proceedings at law by a creditor after a decree for the administration of the estate of a deceased person, the object being to secure equality amongst the creditors: Dan. Pr. 1211; 2 Lea. Ca. Eq. 522; *Morrice* v. *Bank of England*, Forrester, 217; *Paxton* v. *Douglas*, 8 Ves. 520: and see *Brooker* v. *Brooker*, *Re Brooker*, 26 L. J. Ch. 411; 5 W. R. 382, where Vice-Chancellor Stuart granted the injunction in a suit commenced by summons under 15 & 16 Vict. c. 86.

(3) The notices have the effect of freeing the executor or administrator from liability for assets to any person of whose claim he shall not have had notice at the time of distribution of the assets, 22 and 23 Vict. c. 35, s. 29.

EXTENT OF ACT.

Act not to extend to Scotland, etc.

XV. This Act is not to extend to *Scotland*, nor are any of the clauses, except clause six and subsequent clauses, to extend to *Ireland*.

FURTHER NOTES ON THE ACT TO AMEND THE LAW OF PROPERTY AND TO RELIEVE TRUSTEES.

Almost all the cases which have been reported upon the construction of 22 & 23 Vict. c. 35 have found a suitable place in the foregoing pages. There remains one case, upon the 4th section of that Act, which may be noticed here. It is the case of *Page* v. *Bennett*, 8 W. R. 300, 339, which came twice before Vice-Chancellor Stuart. The point decided on the first occasion was that a bill seeking a declaration under that section must allege that the defendant is taking active measures to enforce a forfeiture by ejectment or otherwise. On the second occasion his Honour held that the section was retrospective, and made the declaration asked on the terms of the plaintiff paying to the defendant his costs at law: under the particular circumstances each party was left to bear his own costs in equity.

On the construction of the 27th section Vice-Chancellor Kindersley, in *Dodson* v. *Sammel*, 29 L. J. Ch. 335; 35 L. T. 429; 8 W. R. 252, held that it was not retrospective, and accordingly refused to order payment out of Court of a fund which had been set aside to answer future liabilities, such as those contemplated by that section.

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